United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-2073

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, ex rel.
EDITH MAY CAMERON, et.al.,

Petitioners-Appellants,

-against-

CHARLES FASTOFF, Director, N.Y.C.
Dep't of Probation, et.al.,

Respondents-Appellants

- x

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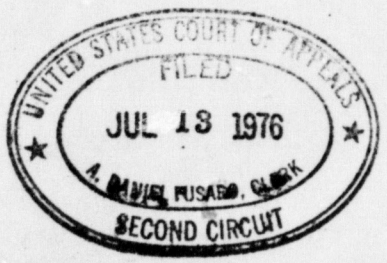
PETITION FOR REHEARING WITH SUGGESTION WITH REHEARING EN BANC AND MOTION FOR EXTENSION OF TIME TO FILE SAME.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA ex rel.
EDITH MAY CAMERON, et al.,

Petitioners-Appellants

- against -

DOCKET # 75-2074

CHARLES FASTOFF, Director, N.Y.C.
Dep't of Probation, et al.,

Respondents-Appellants

- x

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DENYING A PETITION FOR A WRIT OF HABEAS CORPUS

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC AND MOTION FOR EXTENSION OF TIME TO FILE SAME

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT:

Petitioners Edith May Cameron, Stanley Taylor Sims, Kenneth Davis, Robert Stuart Williams, Marvin Cameron and Jennie Sims respectfully petition this Court for a rehearing, with suggestion for rehearing en banc, of their appeal from two orders of the United States District Court for the Eastern District of New York, entered March 1, 1975 denying appellants petition for writs of habeas corpus. A Panel of this Court,

DILLER, SCHMUKLER & ASNESS
ATTORNEYS AT LAW

HOWARD J. DILLER
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July 13, 1976

The Honorable Judges
of The Court of Appeals
For The Second Circuit
Foley Square
New York, New York

Re: UNITED STAES OF AMERICA, ex rel.
EDITH MAY CAMERON, et.al.,
- against -
CHARLES FASTOFF, Director, N.Y.C.
Dep't of Probation, et.al.

Dear Sirs:

Since filing the Petition for Rehearing and Motion for extension of time to file Petition for the Rehearing in the above entitled case, the Supreme Court of the State of New York (Brennan,J.) has entered an order dated June 22nd denying a motion to vacate the judgment of conviction pursuant to §440.10 (h) of the Criminal Procedure Law holding that there is no available State remedy under CPL, §440.10 (2) (see attached).

Yours truly,

Howard J. Diller

cc: Honorable Louis Lefkowitz
Attorney General of State of New York
2 World Trade Center
New York, New York
Att: Lillian Z. Cohen

Encs.

(Timbers, Mansfield and Gurfein) affirmed in an opinion dated April, 1976, Slip. Op.

Petitioners also move this court for an order extending the time within which to file the instant petition to July 8, 1976, for the reasons herein-after set forth.

POINT I

SINCE THE PANEL OF THIS COURT BASED ITS DECISION THAT STATE REMEDIES HAD NOT BEEN EXHAUSTED ON REPRESENTATIONS BY THE STATE BEFORE THIS COURT THAT STATE REMEDIES WERE AVAILABLE TO PETITIONERS-APPELLANT, AND SINCE THE STATE NOW ARGUES TO ITS OWN COURTS THAT NO SUCH REMEDIES ARE AVAILABLE. THIS COURT SHOULD REHEAR THE CASE, DISREGARD THE STATE'S ARGUMENT AND REACH THE MERITS OF THE DISPUTE.

After the Panel of this Court affirmed the denial of the writs of habeas corpus in the above captioned case, holding that state remedies had not been exhausted, because, according to the brief submitted to this Court by the State, C.P.L.§440.10 provided a post conviction remedy, petitioners brought such a motion in the State Supreme Court. In reply to that motion, the State has taken the exact opposite position that it took before this Court, and has argued that C.P.L.§440.10 provides no remedy to petitioners, (See attached Reply Affirmation).

Because the State's reply to petitioners motion was not filed until June 14, 1976, well beyond the period in which to ask this Court for rehearing, these new facts, amounting to the practice by the State, of legal double dealing before this Court, could not be presented until now. Petitioners, therefore, ask for an extension of time in which to file the instant petition and for its grant on the merits.

It has always been the practice for the State to argue in its own Courts against a post conviction remedy under C.P.L.§ 440.10. The State Courts uniformly accept the State's position and leave is denied to the intermediate appellate courts. There

will, therefore, be no State Court of Appeals decision construing a remedy under C.P.L.§440.10, and this Court will become a party to the State's chicanery which serves only to waste the time, money and efforts of defendants, their counsel and the judiciary.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE APPEAL SHOULD BE REHEARD BY THIS COURT AND SHOULD BE DECIDED ON THE MERITS.

Respectfully submitted,

DILLER, SCHMUKLER & ASNESS ESQS.
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LAWRENCE STERN
Of Counsel

BAS:gg
6/11/76

SUPREME COURT OF THE STATE OF NEW YORK
CRIMINAL TERM : COUNTY OF QUEENS

The People of the State of New York,	AFFIRMATION IN OPPOSITION TO A MOTION TO VACATE
-against-	
EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STUART WILLIAMS, MARVIN CAMERON, AND JENNIE SIMS,	Indictment No. 2115 and 2116/71
Defendants.	

State of New York)
: ss.:
County of Queens)

I, BARRY A. SCHWARTZ, being an attorney at law admitted to practice in the courts of this state and an assistant district attorney of Queens County, in the office of Nicholas Ferraro, District Attorney of Queens County, attorney of record for the People of the State of New York, do hereby affirm the statements herein to be true under the penalties of perjury except such as are made upon information and belief, which matter I believe to be true.

1. This affirmation is submitted in opposition to defendants' motion for an order pursuant to Criminal Procedure Law §440.10 (1)(h) vacating the judgment heretofore entered against defendants herein and for such other and further relief as to the Court seems just and proper.

2. On May 21, 1971, upon the affidavit of Patrolman Lucido Bonino, Shield 7514, 16th Division, the Hon. Nicholas Tsoucalas issued a search warrant for the location 197-01 116th Avenue,

St. Albans, New York. Upon the execution of the warrant, large quantities of heroin, drug paraphernalia, and gambling paraphernalia were seized. A .22 caliber revolver was also seized [Exhibit A-1, A-2, and A-3].

3. As a result of the seizure of the aforementioned material, the defendants were indicted on June 8, 1971, under Indictments No. 2115-71 and 2116-71. Edith Cameron and Marvin Cameron were indicted for the crimes of criminal possession of dangerous drugs in the first degree [Penal Law §220.23], promoting gambling in the first degree [Penal Law §225.10], possession of gambling records in the first degree [Penal Law §225.20], and possession of a dangerous weapon as a misdemeanor [Penal Law §265.05]. Stanley Sims, Robert Williams, and Kenneth Davis were indicted for the crimes of criminal possession of dangerous drugs in the first degree [Penal Law §220.23], promoting gambling in the first degree [Penal Law §225.10], and possession of gambling records in the first degree [Penal Law §225.20]. Jennie Sims was indicted for the crimes of promoting gambling in the first degree [Penal Law §225.10], possession of gambling records in the first degree [Penal Law §225.20], and possession of a dangerous weapon as a misdemeanor [Penal Law §265.05].

4. On September 27, 1971, the Hon. Albert H. Bosch issued an order granting defendants' motion to controvert the search warrant and to suppress evidence to the extent of ordering

a hearing[see Exhibits B-1, B-2, and B-3].

5. In an order dated November 30, 1971, the Hon. Frank D. O'Connor denied, in an opinion, defendants' motion to controvert the warrant and to suppress evidence. In the court's opinion, it was noted that both parties waived the hearing previously ordered by Mr. Justice Bosch [see Exhibit C].

6. On January 26, 1972, the Hon. William C. Brennan denied a second motion made by the defendants for a hearing to controvert the search warrant and suppression of evidence. This second motion was brought on the grounds that the affidavit in support of the search warrant was perjurious [see Exhibits D-1, D-2, and D-3].

7. On February 17, 1972, the defendants Robert Williams and Marvin Cameron sought to withdraw their previously entered pleas of not guilty and to plead guilty to the charge of criminal possession of a dangerous drug in the second degre [Penal Law §220.15]. The defendants Kenneth Davis and Stanley Sims offered to plead guilty to attempted criminal possession of a dangerous drug in the second degree [Penal Law §110/220.15]. The defendants Edith Cameron and Jennie Sims offered to plead guilty to possession of gambling records in the second degree [Penal Law §225.15]; all in satisfaction of Indictment Numbers 2115-71 and 2116-71. After a determination that the pleas offered by the defendants were knowingly and voluntarily entered and that defendants admitted their guilt, they were accepted by

the court.

8. On May 15, 1972, the defendants were sentenced by the Hon. William C. Brennan. Robert Williams, Stanley Sims, and Marvin Cameron were sentenced to an indeterminate term of imprisonment not to exceed 15 years. Kenneth Davis was sentenced to an indeterminat term of imprisonment not to exceed 12 years. Edith Cameron and Jennie Sims were sentenced to a period of probation not to exceed 3 years, and fined $1,000.

9. All of the defendants appealed the aforementioned judgments of conviction to the Appellate Division. On December 29, 1972, the Appellate Division ordered that the cases of the six appellants be remitted to the court below for a hearing and a new determination on appellants' motion to suppress evidence on the ground that statements contained in the affidavit upon which the search warrants were issued were perjurious [see Exhibit E; People v. Cameron, et. al., 40 A D 2d 1034 (2d Dept., 1972)].

10. Pursuant to the direction of the Appellate Division, a hearing was held before the Hon. William C. Brennan. On August 14, 1973, Mr. Justice Brennan, in an opinion, denied defendants' application to suppress [see Exhibit F].

11. Upon the entry of the August 14, 1973, order of Mr. Justice Brennan, the matter was rebriefed and reargued in the Appellate Division. On May 6, 1974, the Appellate Division,

in an opinion affirmed the judgment of conviction and upheld Mr. Justice Brennan's denial of defendants' motion to suppress [see Exhibit G; People v. Cameron, et al. 44 A D 2d 355 (2d Dept., 1974)].

12. On May 29, 1974, leave to appeal to the Court of Appeals was denied and on December 9, 1974, defendants' petition for a writ of certiorari was denied by the Supreme Court of the United States.

13. Thereafter, the defendants filed a petition in the United States District Court for a writ of habeas corpus which was denied on March 31, 1975 by Judge Bruchhausen [see Exhibit H].

14. The defendants appealed the denial of the writ of habeas corpus and on April 22, 1976, a unanimous decision was rendered by the United States Court of Appeals for the Second Circuit, affirming the denial of the writ [see Exhibit I].

15. The defendants now return to the court of original jurisdiction with the instant application. They urge that the judgment be vacated on the grounds that during the course of the hearing held June 5, 1973 et sec., witness Patrolman Lucindo Bonino, Shield 7514, 67th Precinct, invoked his Fifth Amendment privilege against self-incrimination; thereby violating defendants' rights under the Fifth, Sixth, and Fourteenth Amendments [see Defendants' moving papers, pp. 1-2].

15. Without reaching the merits of defendants' contentions, it is necessary to determine whether the defendants are proce-

durally barred from making the instant application. In this connection, it is respectfully noted that although the defendants failed to grapple with this question either in their moving papers or the accompanying memorandum of law, they, in fact, conceded in their brief to the United States Court of Appeals that §440.10, subd. 2 mandates the denial of this motion [see Exhibit J, pp. 130a].

16. Respondent agrees with the interpretation of the aforementioned statute made by the defendants in their argument to the United States Court of Appeals. It is clear that during the course of their appeal to the Appellate Division following the hearing, the defendants had an opportunity to litigate the issues raised in the instant application. It is unnecessary for this Court to determine whether or not the state appellate courts passed on the instant issues, for if indeed the appellate courts passed on the issues, the defendants are barred by §440.10, subd.2, subd. a. Conversly, if the state appellate courts were not apprised of the issues at bar, and in the absence of any explanation by the defendants for failing to raise these issues on appeal, they are procedurally barred herein under §440.10, subd.2, subd. c.

17. In any event, defendants' application must also fail on its merit. Although defendants persist in claiming that Patrolman Bonino invoked his privilege against self-incrimination with respect to issues concerning the truthfulness of the search warrant affidavit, the hearing court did not so find, the

appellate courts did not so find, and the record conclusively refutes this crucial contention. What in fact happened at the hearing was that defense counsel asked Patrolman Bonino whether he had been asked about the truthfulness of the affidavit when he was questioned in a federal grand jury. The officer's response was "As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privilege" (see Exhibit K, p.174]. The defense counsel went on to ask a series of questions concerning the underlying facts contained in the affidavit. Patrolman Bonino answered each and every question (see Exhibit K, pp. 174-204]. At no time did defense counsel ask Patrolman Bonino the critical question which was the very subject of the hearing; to wit: whether or not any and/or all of the facts alleged in the affidavit were true. Under such circumstances, it is the height of sophistry to contend, as defendants do, that their ability to cross-examine was curtailed, when in fact they never even propounded the question.

18. With respect to those questions to which Patrolman Bonino did invoke his privilege against self-incrimination, it is clear that the questions were directed to issues that were wholly collateral to the question that was to be resolved at the hearing. At best, these issues bore upon the witness' credibility and under such circumstances the invocation of the witness'

privilege against self-incrimination did not amount to an undue restriction of the defendants' rights to confront witnesses. Namet v. United States, 373 U.S. 179, 185-186 (1963); United States v. Cardillo, 316 F.2d 606 (2d Cir., 1963); Fountain v. United States, 384 F. 2d 624(5th Cir., 1968); People v. Stridiron, 33 N.Y. 2d 287 (1973). It is therefore submitted that under the circumstances at bar, the defendants' contention that their constitutional rights were unduly restricted is without merit.

WHEREFORE, defendants' motion to vacate must be denied.

Barry A. Schwartz

Dated: Kew Gardens, New York
June 14, 1976